

Focus

Appellate Law/Business Litigation

Preserving Surveillance Footage in Slip-and-Fall Liability Cases

BY ALLIE J. HALLMARK AND GINA MILLS

Texas courts have long held that for an invitee to prevail on a premises liability claim, the claimant must prove the owner had actual or constructive knowledge of a dangerous condition. For constructive knowledge, the condition must have existed long enough to give the owner a reasonable opportunity to discover it.

The Texas Supreme Court in *H-E-B, LP v. Peterson* recently reaffirmed that constructive knowledge remains the critical, often dispositive, element in slip-and-fall cases. Although parties may view *Peterson* as a win for premises owners, the Court’s reliance on the seminal spoliation case, *Brookshire Brothers, Ltd. v. Aldridge*, highlights the duty of owners to preserve surveillance footage and the opportunity for slip-and-fall plaintiffs to obtain a spoliation inference when the footage is deleted.

Peterson’s Fall

In *Peterson*, a customer slipped on a puddle in an H-E-B store after a rain-storm. H-E-B argued on summary judgment that there was no evidence of constructive knowledge. In response, Peterson offered the incident report identifying the puddle as rainwater, testimony regarding the size of the puddle and recent rain, a history of prior leaks from rain, and inspection procedures.

H-E-B had no surveillance cameras fixed on the location of the puddle,

but its cameras confirmed that during the two hours preceding the fall, no employees walked down the aisle in which the puddle had formed. Peterson argued that this showed employees neglecting to inspect the aisle for known leaks.

None of this evidence, the Court held, raised a fact issue that H-E-B had constructive knowledge of the specific puddle Peterson slipped on. Without temporal evidence showing how long it existed, Peterson’s case was dismissed.

While *Peterson* focused on what evidence fails to satisfy the time-notice rule, its reference to *Aldridge*—another grocery store slip-and-fall—speaks volumes about what evidence *will* pass the test. In a single sentence, the Court observed that in *Aldridge*, surveillance video showing employees walking by the location of a grease spill during the five minutes preceding the plaintiff’s fall was some evidence of constructive knowledge.

Aldridge’s Rise

Peterson’s reliance on *Aldridge* is significant for another reason. Though *Aldridge* was a slip-and-fall case, it is best known for providing the framework to impose sanctions for spoliation of evidence in Texas.

There, Brookshire’s cameras captured the location of Aldridge’s fall. The store created an incident report concluding that Aldridge slipped on leaking grease, although it retained only eight minutes of the video footage.

Aldridge argued that Brookshire spoliated evidence that would have been helpful to show whether the grease was on the floor long enough to give the store a reasonable opportunity to discover it—i.e., constructive knowledge. The trial court agreed and gave a spoliation instruction at trial.

On appeal, the Texas Supreme Court held that a trial court may only issue a spoliation instruction if the party: (1) intentionally spoliated evidence, or (2) negligently spoliated evidence that irreparably deprives the non-spoliating party of a meaningful opportunity to prosecute or defend the suit.

Applying its new rule, the Court concluded that the spoliation instruction was improper because there was no evidence Brookshire intended to conceal additional footage or that its absence irreparably deprived Aldridge of the ability to present his claim. Aldridge had other evidence, including the five minutes of video showing employees walking by that *Peterson* would cite years later.

Had Brookshire allowed *all* surveillance footage to be destroyed, the Court noted, the outcome may have been different.

H-E-B’s cameras had captured not simply the end of the aisle but actually the location of the puddle for some period before the fall—perhaps just five minutes—summary judgment would have been inappropriate.

Peterson implicitly affirms that video footage may be the most material temporal evidence to create a fact issue on constructive knowledge. Of course, Peterson herself did not choose the location of the puddle or the placement of H-E-B’s cameras, factors ultimately fatal to her particular case. But *Peterson* and *Aldridge* together serve as a reminder that the existence and preservation of relevant surveillance footage is critical in slip-and-fall cases.

Putting this into practice, injured parties should promptly provide notice of a potential claim and premises owners must preserve all evidence that may be relevant—including available surveillance footage of the vicinity of the fall for a reasonable time.

Once in litigation, slip-and-fall plaintiffs must request the owner’s video footage, moving to compel if necessary. If an owner fails to preserve relevant footage, even if by mere negligence, plaintiffs should seek spoliation sanctions because—applying *Peterson* and *Aldridge*—the absence of this temporal evidence may irreparably prevent them from satisfying the constructive notice element.

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